

# **Exhibit 28**

2009 WL 3805458

[2009] EWHC 2965 (Ch) Official Transcript [2009] EWHC 2965 (Ch) Official Transcript

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**CDV Software Entertainment AG v Gamecock Media Europe Ltd**

**Chancery Division**

**20 November 2009**

**Case Analysis**

**Where Reported** [2009] EWHC 2965 (Ch); [Official Transcript](#);

**Case Digest**

**Subject:** Contracts

**Keywords:** Interpretation, Termination, Late delivery, Repudiation

**Abstract:** The claimant company (C) sought the repayment of sums which it had paid out under a publishing and distribution agreement with the first defendant company (G) upon the purported termination of that agreement in respect of certain video games.

C, a distributor of video games, and G, a video games publisher, had entered into a five-year agreement under which G granted C exclusive distribution and other rights in respect of seven video games in the United Kingdom and other countries. C paid very substantial advances to G in respect of the products and had, in addition, incurred marketing and other costs in preparation for their launch and distribution. C subsequently claimed that G was late in delivering a number of the products, and it sought to exercise a contractual right under the agreement by terminating it in respect of four of the video games, but leaving the agreement in place in relation to the remaining three. The agreement expressly provided that, in the event that C exercised its partial termination right, it would be entitled to be repaid the advances in respect of the terminated games, together with certain wasted costs, and that C would retain the rights to those products unless and until those sums were repaid.

G admitted the late delivery of one game and accepted that it was liable to repay the advances in respect of that product, but it denied late delivery in respect of the other three games ("Dementium", "Velvet Assassin" and "Mushroom Men") and further contended that, in any event, C had waived its rights or affirmed the agreement. G submitted that, by terminating the agreement, C had repudiated it, thus entitling G to bring it to an end by accepting that repudiatory breach. Since that purported termination of the agreement, G and the second and third defendants (S) had set about exploiting the products. C contended that G had thereby breached the agreement, and that S had induced such breaches by G or infringed C's intellectual property rights as it was the exclusive licensee under the agreement. The court was required to determine, inter alia (i) G's delivery obligations under the terms of the agreement;

(ii) the circumstances in which C was entitled to exercise a right of partial termination of the agreement; (iii) whether C was entitled to exercise a right of termination in respect of the three remaining terminated games; (iv) whether, by purporting partially to terminate the agreement, C had renounced or repudiated it.

On the proper construction of a publishing and distribution agreement concerning a number of video games, following the late delivery of two of the games by the publisher, the distributor had been entitled to exercise its right of partial termination of the agreement and recover advances paid in respect of the terminated games together with certain wasted costs.

Judgment for claimant in part. (1) When the language used in an instrument gave rise to difficulties of construction, the court had to decide what a reasonable person would have understood the parties to have meant by using the language which they did, *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* applied. In the instant case, although the agreement had been drafted clumsily, a reasonable person would have understood the parties to have meant that G was required to have obtained approval from the games' console manufacturer or C (as the case might be), and to have delivered the master versions of the game to C by, at the latest, the last day of the month specified in a schedule to the agreement. In the light of that construction, G had delivered the three remaining terminated games late. (2) The practical way in which the agreement was expected to operate was that G complied with its obligations to C so far as development schedules and delivery of the game were concerned, and if unforced and reasonable delays in development occurred, then G had to face up to that fact and agree a revised delivery date, which might, or might not, trigger C's partial termination rights. Prior refusal by C to consent to revised delivery dates was not required for the right of partial termination to be exercisable, nor was C required to exercise its partial termination rights within a reasonable time. (3) In the circumstances, C was not entitled to exercise its right of partial termination in respect of "Dementium", as, by its conduct, C had demonstrated that it had accepted delays in the development and delivery of that game and therefore waived its right to partial termination. However, no such affirmation of the delays had occurred in respect of "Velvet Assassin" and "Mushroom Men", and C was, accordingly, entitled to exercise its right of termination in respect of those two games and to recover the advances paid as well as sums in respect of wasted costs. (4) Although C was wrong about its entitlement to terminate the agreement in relation to "Dementium", it had not, by purporting to do so, renounced or repudiated the agreement. Far from repudiating the contract, C had relied upon it and invoked one of its contractual provisions, in order to exercise its right of partial termination. The position which it adopted was that the agreement remained fully in force, except to the extent that it had been terminated in respect of particular products. Accordingly, C did not repudiate the agreement and G was accordingly not entitled to treat itself as discharged from the agreement on the alleged grounds of C's repudiatory breach.

Judgment for claimant in part

**Judges:** Gloster, J DBE

**Counsel:** For I :the claimant: Robert Howe QC, Mark Vinall For I :the defendants:

Duncan McCall QC, Benjamin Pilling

**Solicitors:** For the claimant: Harbottle & Lewis LLP For the defendants: Bird & Bird LLP

### **Appellate History**

#### **Related Cases**

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